Empowering Victims and Advocates : Reaching Beyond Legal State Obligations to Combat Slavery and Advance Human Rights

論文（*Article*）

Empowering Victims and Advocates: Reaching Beyond Legal State Obligations to Combat Slavery and Advance Human Rights

金　美穂
Miho Kim

The international bill of human rights, namely, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and International Covenant on Civil and Political Rights and its two Optional Protocols, reaffirm the achievement of all human rights as a basis for peace and justice in the world. This context lends significant normative weight to global multistakeholder efforts to combat slavery and slavery-like forms of exploitation. Yet, slavery has been an entrenched practice worldwide. Therefore, it should be no surprise that justiciable, positive legal duties arising from various international legal instruments are imposed on states towards its eradication.

However, this paper suggests that human rights norms most inhospitable to slavery can be implemented successfully with locally unique strategies that integrate principles and practices of 'vernacularization,' involving local participants and activists in conjunction with state efforts. A brief case study of KALAKASAN, a Filipino migrant women's community organization based in Japan, is introduced to illustrate the potential impact of vernacularization on advancing human rights protections. While the obligations of states to protect human rights should be interpreted narrowly, minimizing deference to local cultural and social contexts, the implementation of these safeguards benefits from meaningful participation by local victims and values.

Key Words : Anti-slavery Law, Vernacularization, International Human Rights Law, Slavery, KALAKASAN, Human Rights Advocacy, Middle Actors

Introduction

When fulfilling positive legal obligations with regard to international human rights law, the state party is expected to a) discern the specific nature of the obligation, b) interpret the law, then c) apply it in a manner consistent with the overarching goal of the human rights project, in the proper context of the objective and purpose for which the legal instrument stands. The legal obligation for conduct, as well as for results, must be explored --with equal importance -- in interpreting relevant human rights treaties and their provisions that may ultimately boost efforts to create state accountability to "bind from above" as well as from "the ground up" as a most secure means of achieving a lasting, sustainable solution in society. Towards that end, since states alone cannot solely achieve this end, participation of other non-state stakeholders helps strengthen cooperation in the larger international community of which the state is part.

The meaning of the term 'slavery' has evolved and expanded to include various practices of human

exploitation "of a person over whom any or all of the powers attaching to the right of ownership are exercised."[1] The 1926 Slavery Convention calls for the "complete abolition of slavery in all its forms", including the "capture, acquisition, sale or exchange, and disposal" of persons. The legal obligations derived from a growing body of human rights jurisprudence mutually reaffirm the normative goal of human rights, requiring upon states a narrow interpretation of these obligations. Supervisory authorities such as the international organs of the United Nations play a critical role in guiding state interpretation. However, human rights norms most inhospitable to slavery can be implemented successfully in ways that are suited and designed for each unique locality, through measures that integrate principles and practices of vernacularization. While the obligations of states to protect human rights should be interpreted narrowly, minimizing deference to local cultural and social contexts, the implementation of these safeguards is uniquely informed by local victims, advocates and values.

Namely, the state would establish an adequate legal framework to advance new human rights norms by minimally ratifying and subsequently harmonizing human rights treaties with domestic law,[2] then conducting legal analysis and interpretation including via judicial proceedings of adjudication, and accordingly, enforcement and monitoring. Addressing slavery and slavery-like exploitative practices concern the very prospect for the realization of human rights for "every person" as touted in the Universal Declaration of Human Rights (UDHR)[3]; therefore, a state obligation must be determined and implemented in the context of the tangible, objective progress of a both *de jure* and *de facto* realization of conditions inhospitable to slavery and slavery-like practices. The vernacularization process fills a unique role in helping engender not only concepts but also norms of human rights within the local lexicon.

Specifically, it is suggested that states lead processes for stewarding the very structure and process for a high-level, multistakeholder effort to provide coordinated facilitation of the dynamic vernacularization efforts so that domesticated human rights law achieve substantive results with regard to curbing, if not eradicating, slavery and slavery-like practices.

Contemporary Forms of Slavery and other 'entrenched practices'

Since the drafting of the 1926 Slavery Convention nearly a century ago, most international legal instruments have included articles concerning the prohibition of slavery besides the aforementioned UDHR, the International Covenant on Civil and Political Rights[4] and, more recently, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol) in 2000.[5]

While numerous international treaties establish and reinforce the duty of all states to prohibit slavery, specific provisions must be interpreted so as to ensure harmony and balance amongst them and with other rules of international law, as stipulated in the Vienna Convention of the Law of Treaties (the Vienna Convention)[6]. Its interpretation clause acknowledges that each provision helps constitute the Convention as a whole whose purpose amounts to a normative end goal to ultimately realize human rights.

However, the manifestations of slavery and slavery-like practices are rife with numerous intractable

1 Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253

2 BT Nyanduga, "Conference Paper: Perspectives on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry into Force of the African Charter on Human and Peoples' Rights" (2006) 6 African Human Rights Law Journal 256, as excerpted from Reyneck Matemba "Incorporation of international and regional human rights instruments: comparative analyses of methods of incorporation and the impact that human rights instruments have in a national legal order," Commonwealth Law Bulletin (2011) 37:3, pp. 435-444, 435

3 United Nations General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III)

4 United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171

5 United Nations Human Rights Council "Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences: Thematic Report on Challenges and Lessons in Combating Contemporary Forms of Slavery" (1 July 2013) A/HRC/24/43 paragraph 8

6 United Nations, Vienna Convention on the Law of Treaties (1969) United Nations, Treaty Series, vol. 1155, p. 331

challenges, whether they are legal and policy-related, institutional, or cultural. Victims number in the tens of millions worldwide and are difficult to identify. To date, the International Labour Organisation (ILO) has stated in 2012 that an estimated 21 million people are subject to 'forced labour,' a contemporary form of slavery and slavery-like exploitation.[7] Exploiters have also diversified: the fact that the more recent Palermo Protocol transpired from the growing interest in the international community to fight 'transnational organized crime' may suggest that states are no longer the primary perpetrators of slavery and related crimes such as trafficking. Corporations, "ultimately responsible for meeting their legal and moral obligations to prevent contemporary forms of slavery in their supply chains,"[8] are repeatedly urged to do more to eradicate slavery and exploitation from their operations.

Legal Obligations of States

Much of the context for applying treaty obligations derives from the process of legal interpretation of treaty provisions. Strict rules apply as to how the states' duties prescribed in treaty provisions ought to be interpreted in the context of the objective of the treaty as a whole. Context includes other relevant international treaties, soft law, and the interpretive opinions issued by other international monitoring bodies, such as 'general comments' by treaty bodies. Resolutions adopted by the political organs of international organizations are recognized as political consensus and thus constitutes 'practice' (whether verbal or action-based) as cited in the Vienna Convention.[9]

States have a positive obligation to fight slavery, not only to protect individuals against the state but against third parties as well, both private and public. All individuals are entitled to this protection within the state's jurisdiction.[10] The states also must proactively create an environment in which rights are enjoyed, and can be held liable for failures traced to shortcomings in protecting individuals from human rights violations by other individuals, as demonstrated in the Velasquez Rodriguez v. Honduras[11] case in the Inter-American Court of Human Rights.[12] In this landmark case, a first to be decided by this particular Court since its establishment, considered this and two other cases that all concerned forced disappearances executed by the Honduran government and its proxies during the early 1980s. While this precedent constitutes case law only within the jurisdiction of the Court, it nevertheless stands to inform adjudicatory practice with regard to cases of similar nature in other jurisdictions.

Implementation

In fulfilling their international obligations, states are positioned as "first port of call,"[13] first and foremost responsible for the achievement of human rights (which of course, notably, is only attainable in the absence of slavery) within their own territorial jurisdictions. The "first port of call" positionality of states is established by the principle of subsidiarity that stipulates that "all domestic remedies must be exhausted first before petitioning the United Nations."[14]

Legal subsidiarity in human rights treaties confirms the validity of relativity as applied to human rights

7 International Labour Organization (ILO), ILO 2012 Global Estimate of Forced Labour: Executive Summary (2012), p. 1.

8 United Nations Human Rights Council "Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences: Thematic Report on Challenges and Lessons in Combating Contemporary Forms of Slavery" paragraph 19

9 Magnus Killander, "Interpreting Regional Human Rights Treaties" (2010) 7 International Journal of Human Rights. 148. Additionally, the Vienna Convention, Article 31, 3(b) specifically references 'practice' with regard to establishment of 'agreement among state parties regarding interpretation.

10 Frédéric Mégret, "Nature of Obligations", *International Human Rights Law* (2nd ed, Oxford University Press 2014) 99

11 Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147(g)(i) (July 29, 1988)

12 ibid 102 The Velásquez Rodríguez case, together with the Godínez Cruz, and Fairén Garbi and Solís Corrales cases, all considered by the Court around the same time, form a trio of landmark cases targeting forced disappearance practices by the Honduran government during the early 1980s.

13 Christof Heyns and Magnus Killander, "Towards Minimum Standards for Regional Human Rights Systems," Cogan et al (eds) *Looking to the future: Essays on international law in honor of W Michael Reisman* (Martinus Nijhoff Publishers 2010) 163

14 Michael K. Addo, "Practice of United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights" (2010) 32 Human Rights Quarterly, pp.601-664; 623

implementation.[15] Jurisprudence of supranational jurisdictions and institutions suggests flexibility in implementation in the context of state institutions, instruments, and processes[16] and thus provides room for cultural influence in practice. However, it should be noted that the latitude for states to develop their own measures does not allow them to skirt their responsibility to relevant treaty provisions or to condone the ongoing reality of exploitation and slavery-like practices in any form. Issues like slavery often reflect a deep disparity of power between the perpetrators and victims of slavery and slavery-like forms of exploitation, compromising the legitimacy of the state's position vis-a-vis stakeholders that seek to rely on the state as not only a capable but a willing partner in tackling slavery. As noted by the UN Special Rapporteur on contemporary forms of slavery, Gulnara Shahinian, "victims are poor, have few political connections and have little power to voice their grievances...In contrast, perpetrators may be wealthy, well-connected individuals who are able to influence policy and enforcement. This can result in corruption and a system in which there is little pressure on authorities to take action to combat exploitation."[17]

As a result, the state is often suspect. In addition, in transitional states, of which there are many impacted by severe forms of exploitation such as slavery, the local population and victims often lack trust and confidence in the very systems of the state, due to their own historical experiences.[18] An unfortunate reality, as observed by an anthropologist Sally Engle Merry, is that states "often resist human rights laws and obligations...Under these conditions, states maintain an appearance of compliance while doing nothing or while doing something that is quite different than what international law specifies as human rights."[19] In addition, some contemporary forms of slavery and discrimination derive from pervasive historical, traditional and cultural practices rooted in society. Increasingly defined as "a way of life" reflecting anthropological approaches.[20] Pursuit of compliance on the part of states therefore may not only encounter distrust of the local community but also face allegations of cultural insensitivity or worse, destruction.

In this context, "vernacularization" as posited by Merry poses a particularly appealing proposition as a key principle in ensuring the success of the human rights agenda. Vernacularization is a process by which the ideas and language of human rights is "extracted from the universal and adapted to national and local communities."[21]

Relatedly, governments are being called to listen to communities most in need as a key strategy to guide effective aid spending on development both at home and abroad, and the sectors that echo this message extend far beyond anti-slavery and trafficking efforts. For example, in submitting his annual report to the Geneva-based Human Rights Council, Saad Alfarargi, the UN independent human rights expert on the right to development, with regard to states being urged to protect the poor against modern slavery, institutions must "maximize the impact of limited resources available…[and] put communities and individuals at the centre of their decision-making."[22]

15 ibid 623

16 ibid 616

17 Human Rights Council, "Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian: Thematic report on challenges and lessons in combating contemporary forms of slavery," paragraph 38

18 Jane E. Stromseth, "Justice on The Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?" *Getting to the Rule of Law* (New York University Press 2011) pp. 169-223

19 Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108, No. 1 American Anthropologist 48

20 Literature on this debate either for or against human rights from various standpoints, largely non-Western, abound in human rights discourse, particularly with regard to 'Asian values' and more recently, 'African values.' In particular, the following article suggests a more nuanced approach that rejects a polarized paradigm of cultural relativism that seeks to abrogate an increasingly apparent norm of universal human rights, to contextualize it in the unique African conception of human rights in harmony with the global standards: Bonny Ibhawoh, "Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse," Netherlands Quarterly of Human Rights, Volume 19 Issue 1 (2001), pp. 43-62

21 Merry 39

22 In the press announcement titled "Governments urged to protect poor against modern slavery, step up development financing," published on UN News on 16 September 2020 (available at https://news.un.org/en/story/2020/09/1072492) the UN independent human rights expert on the right to development, Saad Alfarargi is quoted as making this appeal in presenting his annual report to the Human Rights Council.See: UN Human Rights Council, "Right to development Report of the Special Rapporteur on the right to development," (2020) UN Doc A/HRC/45/15

Actors of Vernacularization

Merry cites the people in "the middle," between the sources of language on the international level and the communities "on the ground," who actively translate ideas and practices of human rights law for the people in local contexts to conceptualize and develop relevant meaning on their own terms; this process is often referred to as "indigenization." Given that human rights is a normative package, which seeks to realize human rights in the social contexts in which people carry out their everyday practice, such 'translators' may comprise one of the indispensable determinants between the state's desire to realize human rights and their actual ability to do so. Due to the nature of the state and the institutions that represent the state, vernacularization is not a role that can be effectively undertaken by state actors alone, particularly if faced with prevailing discontent and/or lack of trust between the local population and state authorities.

Vernacularization is also inclusive, in theory, of participants other than just 'translators' that can traverse the realms of international law and social contexts. Often victims and survivors of slavery or slavery-like practices have emerged to become compelling agents of change in advancing human rights, proving to be effective ambassadors of the human rights message and helping grow a broad-based movement formidable enough to hold their states accountable to their international obligations.

Unfortunately, it is far too common that the many domestic violence victims are also afflicted by trafficking and other forms of exploitation. Yet, many survivors come to see themselves as victims of abuse, rather than subjects of discipline, and end up leading battered women's movements to achieve successes on the national level.[23] For example, a Filipino survivor-turned-advocate based in Japan, the host country of tens of thousands of "entertainer" women from the Philippines, states, "when we speak at different gatherings to inform various groups of people of our experiences and dreams so that they will understand our situation, [we] appeal for common action in protection of life…"[24] She and other fellow members of KALAKASAN (a Tagalog word for strength), a Filipino migrant women's organization based in the Kanto region of Japan, have testified at the Japanese Diet, successfully pushing for reform of the national Law for the Prevention of Spousal Violence and the Protections of Victims in 2003.[25] For these women, such advocacy for their rights is intricately connected to their effort to reclaim part of their identity, a particularly "Filipino identify," rather than sanitized of their particular cultural sensibilities to join the ranks of Western human rights advocates.

Local Knowledge of the Social Cultural Context

In the instance of KALAKASAN women, it is evident that universality (not uniformity) of human rights is not incompatible with culture but may even help promote diversity by protecting cultural freedom as guaranteed in treaties, seeing culture as a human right.[26] As Freeman notes, "[h]uman dignity, the basis of human rights, is expressed in cultural diversity."[27]

Fighting culturally ingrained traditional practices entails acknowledging one that may either be inconsistent with, if not obstruct, the purpose and objective of the human rights norm in question, a task that invariably warrants a delicate response.[28] Such distinction is often difficult to make, in addition to ensuring public perception of such a distinction so as to preempt any backlash. Making such a fine distinction requires local actors to indigenize the notion that a practice can be changed with respect for the local culture intact. This process, often dynamic and iterative, integrates cultural sensitivity, which some argue

23 ibid 41

24 Leny Tolentino, "From Victimization to Empowerment: Experiences at KALAKASAN Migrant Women Empowerment Center" (2006) 10 Peoples for Human Rights 127

25 ibid 130

26 Addo 622

27 Michael Freeman, *Human Rights* (2nd edn, Polity Press 2011) 123

28 An example of women by and large being regarded as belonging to the private domains of the home is cited by the UN expert. See: Human Rights Council, "Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian: Thematic report on challenges and lessons in combating contemporary forms of slavery," paragraph 40

is a moral and practical necessity for human rights implementation.[29]

Furthermore, empowering the local population offers an additional advantage rarely availed by other stakeholders. Slavery and slavery-like practices are often clandestine, and the isolation of victims is exacerbated by the social exclusion the overwhelming majority of them suffer, due to poverty and various forms of discrimination. Even when states are resourced for the task, victims often cannot be located.[30] KALAKASAN has utilized its 'direct service' programming to safely locate victims, who otherwise cannot be engaged with due to concerns for their safety from retaliation or other repercussions.[31] While such efforts on the local level are but one small step in a multitude of efforts to establish human rights norms and practices, the sense of agency and ownership among survivor advocates help capture and infuse cultural nuance necessary for a meaningful participation by impacted civil society members themselves. Left alone to "bind from above," the state government officials alone may lack the capacity, not to mention cultural competency, to succeed in working with the very communities for whom human rights protections are most urgently needed.

Conclusion

In light of the uneven power of perpetrators and victims of slavery and the rarely neutral position of states vis-a-vis these actors, the legal interpretation of treaty provisions must be subject to normative guidance of the human rights regime and a growing body of jurisprudence as basis of support, in accordance with strict criteria for interpretation. And in spite of various approaches suggested to tackle slavery head-on, and to enable states to achieve most tangible positive results, treaty bodies are reasonably positioned to be supervisory and while not 'binding,' issue comments and opinions and in some cases, judgments, as relevant guideposts towards building the domestic legal tradition among willing states: to develop and strengthen norms to fill the void of enforcement in the realm of international human rights.

On the other hand, stakeholder engagement in implementation reflects numerous advantages going beyond compensating for various deficiencies on the part of the state or augmenting its existing mechanisms and capacities. Indeed, activists have asserted that when local actors exercise agency, human rights ideas are far more successfully grounded in the local vernacular, thereby rendering human rights' safeguards "practical and effective."[32]

To this end, political will is key. The Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, famously articulating a wide range of positive duties carried by States with regard to guarantee of rights enunciated therein, places a limitation on implementation, that it be done "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…"[33] It is a widely known practice by states to invoke this limitation as an escape clause to explain or justify lack of positive action in reporting to treaty bodies. Under such circumstances, ongoing vernacularization efforts and indigenization of human rights values by local actors on the ground both serve to raise awareness about the importance of human rights norms in effectively combating slavery within the realm of civil society to grow and mount a politically formidable influence for advocacy.

Knowledge is a prerequisite to cultivation of demand and political advocacy to hold the state government accountable to fulfill its relevant duties, and as Merry has noted, the actors "in the middle" between the human rights bodies, the state, and its constituents on the ground, serve as indispensable "translators" of the bodies of knowledge, experiences and cultural perspectives in respective spheres, negotiating "the

29 P. Healy, "Human Rights and Intercultural Relations: A Hermeneutico-Dialogical Approach" Philosophy & Social Criticism (2006) 32

30 Human Rights Council, "Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian: Thematic report on challenges and lessons in combating contemporary forms of slavery," paragraph 19

31 Tolentino 129

32 Killander 150

33 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1(1)

middle in a field of power and opportunity." For instance, she continues, "[o]n the one hand, they have to speak the language of international human rights…On the other hand, they have to present their initiatives in cultural terms that will be acceptable to at least some of the local community."[34]

Thus, local victims harness the power of their own voices -- as seen in the case of KALAKASAN women -- to be heard *and* heeded in policymaking arenas (thereby rendering their efforts *bona fide* "effective."). Such dynamic cross-sectoral processes that promote indigenization of human rights norms thus has demonstrably contributed towards addressing, if not ultimately eradicating, the abhorrent practices of slavery, in lockstep with, rather than apart from, state's legal obligations.

Further investigation of the potential and impacts of local and middle actors across civil society would therefore be a worthwhile endeavor. Insights from such research and analysis would very likely contribute to more refined articulation of theories of change that can inform cross-sector collaboration among advocates of human rights -- from state, and civil society, to the international community – and subsequently, move more effectively, the vision of human rights achievement from the realm of aspirational to achievable.

34 Merry 42